

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

77-6049

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6049

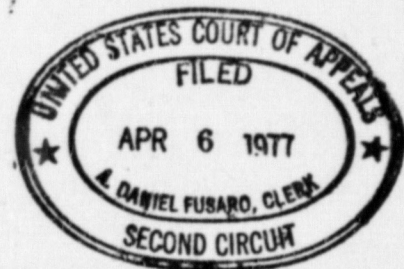
SECRETARY OF THE INTERIOR, et al.,

Appellants

v.

COUNTY OF SUFFOLK, et al.,

Appellees



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE
NEW ENGLAND COUNCIL
IN SUPPORT OF APPELLANTS

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1. New England has a vital interest in Lease Sale 40

The New England Council files this brief as an amicus curiae for the purpose of inviting the Court's attention to the vital importance to New England of the Outer Continental Shelf ("OCS") program. Lease Sale 40 is one facet of the OCS program; following closely behind is Lease Sale 42 (Georges Bank).^{1/} Hearings on the draft Environmental Impact Statement

^{1/} The Bureau of Land Management scheduled the Final Environmental Impact Statement for Lease Sale No. 42 to be completed in March, 1977 and for sales to begin in June, 1977. (42 Fed. Res. 3035 (Jan. 14, 1977).) Current plans are for the Final Environmental Impact Statement to be completed by May, 1977 and for sales to begin in the fall of 1977. (Binder Aff. ¶4.)

for Lease Sale 42 have already been held. The Court's decision here will very likely have an important impact on Sale 42. Because of its proximity and its potential as a domestic source of energy Lease Sale 40 is of direct importance to the New England region.

The New England Council was organized in 1925 by the governors of the six New England states for the purpose of working to develop and strengthen the economy of New England. The Council has two thousand members, both individuals and business entities, from the six New England states. Its operations are financed by membership dues. The Council is broadly representative and reflects the interests of the region. At the present time there are few issues more important to New England than the development of a nearby domestic energy source. The most promising opportunity to obtain such an energy source is through the OCS program.

The decision of the lower court dated February 17, 1977 ("Order, Feb. 17, 1977") must be reversed because it amounts to a finding that the preparers of the Environmental Impact Statement should have engaged in speculation and mind-reading. To frustrate important national policy on the basis of such a finding is dangerous to the welfare of the country and the regions (including New England) most directly affected.

The lower court itself stated in its Order of August 13, 1976 ("Order, Aug. 13, 1976") that the Environmental Impact Statement is "within the limit of reasonable researchers and writers, a studied effort..." is "too detailed and encyclopedic" and "sufficiently apprised him [Secretary of the Interior] of the overall dangers, so that further refinements were not worth the delays required to make them." (Order, Aug. 13, 1976 at 31, 19.) Yet the Court's final decision is based upon a search for alleged omissions having no consequence whatsoever. The Court has engaged in what the court in Brooks v. Coleman, 518 F.2d 17, 19 (9th Cir. 1975) has called a "fly speck[ed]" review of the Environmental Impact Statement. The national interest ought not be so frustrated.

2. NEPA requires a balancing of other national interests against environmental concerns.

The Act, itself, is instructive. "Practical means and measures" are to be used, to foster and promote conditions under which "man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans". (42 U.S.C. §4331(a)) (emphasis supplied). This is to be done "consistent with other essential considerations of national policy." (42 U.S.C. §4331 (b)(2)). The end, among others, is to assure "productive"

surroundings. (42 U.S.C. §4331(b)(2)). The purpose is to achieve "a balance ... which will permit high standards of living and a wide sharing of life's amenities". (42 U.S.C. §4331(b)(5)). Without a healthy economy America cannot achieve such goals.

National policy with respect to energy is defined in the Outer Continental Shelf Act which states that the purpose of the leases is:

"...to meet the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf, ..." (emphasis supplied)
(43 U.S.C. §1337)

The urgency of the legislative mandate was highlighted by the directives of the past administrations, particularly in response to the Arab oil embargo. (Order, Feb. 17, 1977, 77-79.)

It is clear that the most promising source of domestic production of petroleum in the United States lies in the Outer Continental Shelf. The record below amply demonstrates that, at least in the short run, the country's economy requires heavy dependence upon petroleum. No elaboration is required concerning the grave consequences of the United States economy being hostage to foreign powers.

This country's oil production peaked in 1972 when domestic production amounted to 11.6 million barrels of oil

per day. (Federal Energy Administration, Monthly Energy Review, September, 1976 at 2.) At that time total consumption was 16.3 million barrels per day. Imported oil accounted for 4.7 million barrels per day or 29% of the country's needs. (Id.) At the time of the Arab oil embargo domestic oil production was 11 million barrels per day. (Id.) Imported oil accounted for 6.25 million barrels per day for a total consumption of 17.25 million barrels a day. (Id.) Immediately prior to the Arab oil embargo, 26 percent (approximately 1.63 million barrels per day) of imported oil was from Arab countries. (Id. at 6.) Despite the shock of the Arab oil embargo this country has become more heavily reliant upon imported oil and, more particularly, upon Arab oil. During the first six months of 1976 total consumption was approximately 17 million barrels per day. (Id. at 3.) Imported oil was 6.8 million barrels per day of which 2.6 million barrels per day, or 38 percent, was from Arab members of OPEC. (Id.) In 1970 \$3 billion was spent on imported oil; by 1975 the figure had risen to \$37 billion (Federal Energy Administration, 1976 National Energy Outlook at xxiii.)

The OCS program is projected to produce, by 1985, 2.3 million barrels per day (Federal Energy Administration, 1976 National Energy Outlook at xxviii). The gravity of the

situation is illustrated in the Federal Energy Administration National Energy Outlook of 1976. This study concludes that it will be impossible to eliminate the need for foreign oil earlier than 1985. However, energy independence could be achieved as early as 1985 if, among other actions, a maximum effort is made to increase supply. (Federal Energy Administration, 1976 National Energy Outlook at xxiii.)

Congress, in the Emergency Petroleum Allocation Act, 15 U.S.C. §751 et seq., declared that:

" . . . shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports . . . have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services,..."
15 U.S.C. § 751.

The Conference Committee on the 1976 Amendments to the Coastal Zone Management Act (16 U.S.C. § 1451) states, there is an urgent need

"to encourage new or expanded oil and natural gas production in an orderly manner from the nation's Outer Continental Shelf (OCS) . . . [as part of the] attainment of a greater degree of energy self-sufficiency, a recognized national objective of the highest importance and priority." (Report of the Committee of

Conference No. 94-987, June 24, 1976, pp. 23-25).^{2/}

The President's annual energy message, which was released on February 26, 1976, very specifically identified the role of the OCS leasing program in response to the United States' dependence on imported oil:

"The OCS particularly in the frontier areas, [such as the Mid-Atlantic area] provides a crucial new potential source of energy for the nation and could produce almost 3 MMB/D [million barrels

^{2/} See also, letter of Congressman John M. Murphy, Chairman Ad Hoc Select Committee on OCS, dated March 31, 1976, transmitting Congressional Research Service Report on the OCS (Def. Ex. G):

"The importance of the energy resources of the outer continental shelf to meet the short-term and intermediate-term energy future of our Nation, cannot be overemphasized. Last year the United States imported approximately 37% of its total oil consumption, or 6 million barrels per day. This year imports are likely to rise to about 7.5 million barrels per day, or more than 40% of our total oil consumption.

"If we can develop the energy resources of the outer continental shelf, we can reverse the trend towards increasing imports. The outer continental shelf has vast oil and natural gas resources, which could benefit the Nation for several more decades, until alternative sources of energy have been developed." (Report p. v).

per day] by 1985." (1976 Energy Message, Detailed Fact Sheet, p. 10.) [emphasis supplied.]^{3/}

These conclusions and policy recommendations have been at the heart of many recent decisions uniformly rejecting NEPA attacks, similar to those made here, upon OCS lease sales. See State of Alaska v. Kleppe, 9 E.R.C. 1497 (D.D.C. August 13, 1976), on appeal, D.C. Cir. (Gulf of Alaska, Sale No. 39); Southern California Association of Governments v. Kleppe, 8 E.R.C. 1922 (D.D.C. 1976) (offshore Southern California, Sale No. 35); People of California v. Morton, 404 F.Supp. 26, 30 (C.D. Calif. 1975), on appeal, 9th Cir. (OCS Program in general and Sale No. 35); Public Citizen v. Morton (D.D.C. Civ. No. 74-739, 1975) (offshore Southern Texas, Sale No. 34); Sierra Club v. Morton (MAFLA) (M.D. Fla., Civ. No. 73-1629,

^{3/} See also Federal Energy Administration, 1976 National Energy Outlook, pp. xxv, xxviii (which relies upon a "strongly pursued" OCS program to meet the nation's near-term energy requirements); National Academy of Sciences "Mineral Resources and the Environment," pp. 81-82 (1975) (which concludes that "the second largest, but probably most accessible domestic oil and gas resource is under the continental shelves", and recommends "[t]hat there be speedy investigation of the continental shelves for oil and gas resources").

(1974), aff'd, 510 F.2d 813 (5th Cir. 1975) (Miss-Ala-Fla, Sale No. 32.) 4/

The Federal Energy Administration Act, 15 U.S.C. §761 et seq., stated in part that "the general welfare and the common defense and security require positive and effective action . . . to promote the expansion of readily useable energy sources" 15 U.S.C. §761(a).

In 1976 the Federal Energy Administration had concluded that the oil producing cartel was in an even stronger position than it was in 1973-1974.

"The events of the past two years have indicated an ability by the oil producing cartel to maintain the high prices of oil established during the embargo, even in the face of substantial declines in world oil demand due to the high prices and reduced rates of world economic growth. It seems clear that little can be done between now and 1980 to alter the supply and demand relationships between OPEC and the consuming nations enough to weaken the cartel's exclusive control over prices." (Federal Energy Administration, 1976 National Energy Outlook at 14.)

4/ NRDC v. Morton, 337 F.Supp 165 (D.D.C. 1971), aff'd, 458 F.2d 827 (D.C. Cir. 1972), a case which on its facts is clearly distinguishable from the instant case, is the only case in which an OCS sale was enjoined on the basis of EIS inadequacy.

The Federal Energy Administration has adopted a two part proposal.

"Our task between now and 1985 is to find and develop more oil and gas and stimulate conservation to offset currently dwindling production of these fuels, as our economy is converted to the more abundant resources, such as coal and nuclear power.

"In the post-1985 period, our task is to develop new technologies that can dramatically expand our economically usable reserves of oil and uranium and make greater use of non-depletable resources, such as solar and geothermal energy."
(Id. at xxii.)

The FEA has projected a goal of increasing domestic oil production from 8.4 million barrels per day in 1975 to 12.3 million barrels per day by 1985. The OCS leasing program is anticipated to play a major role in achieving this goal by adding 2.3 million barrels of oil per day by 1985. As a result "the Lower-48 OCS is the second most important area for expanding domestic production". (Federal Energy Administration, 1976 National Energy Outlook at 65.) The 2.3 million barrels of oil per day that the OCS could produce is particularly important because "the main source of today's domestic crude production -- Lower-48 onshore initial reserves -- will shrink by two-thirds by 1985 and by 80 percent by 1989. Before crude production on the Lower-48 can expand, the withdrawals which

account for this decline must be replaced." (Id. at 63). To reach the goal of increasing production and to decrease reliance on imports every possible source of domestic energy production is vital because "[i]f one or more domestic energy sources do not achieve these projected levels, imports will make up the shortage because other domestic fuel sources could not compensate for the loss." (Id. at xxv).

The need for natural gas is as critical. The Federal Energy Administration has stated:

"Curtailments of supply to the price regulated interstate pipelines are expected to increase as total supplies continue to decline and available gas is dedicated to the unregulated intrastate market. In 1970 curtailments reported by interstate pipelines were less than 1 percent of requirements. By 1974, curtailments increased to 10 percent of total requirements, and were forecast to rise to as much as 15 percent in 1975. The economic impacts of this shortage, however, were greatly mitigated by the switching of industrial users from natural gas to higher priced alternative fuels (propane, residual or distillate oil); mild weather conditions;

"The major economic effects of the curtailments in the East and Midwest resulted from the higher costs of alternative fuels. These costs reduced the ability of industrial firms to compete with similar firms in other areas that did not have to utilize high-priced alternate fuels. In addition, curtailments have led to widespread adoption of restrictions on new natural gas connections of residential and commercial space heating." (1976 National Energy Outlook at 9.)

This projection was based upon occurrences in the winter of 1974 through 1975 involving minimal shutdowns because of recession and mild weather. (Id. at 126.) However, the Federal Energy Administration predicted that an increase in the natural gas shortage would occur in 1976-77 if the economy returned to normal levels of activity and if there were a severe winter. (Id.)

OCS leasing has the potential to enable the natural gas supply to keep pace with demand. The Federal Energy Administration projects that the demand for natural gas in 1985 will be 23 trillion cubic feet and that if the rate of OCS leasing is increased by 45% in total acreage natural gas production could reach 25.3 trillion cubic feet by 1985. However, if the leasing rate decreases, natural gas production could be as low as 20.5 trillion cubic feet. (Federal Energy Administration, 1976 National Energy Outlook at 161).

The legislative history of NEPA clearly indicates that it was never contemplated that environmental matters would predominate over other factors in a decision-making process. Senator Henry Jackson, NEPA's principal Congressional sponsor, recognized that the purpose of NEPA was only to insure disclosure of environmental issues in addition to other considerations of national policy. (115 Cong. Rec. 29055 (1969).)

Brooks v. Volpe, 350 F.Supp. 269 (D.Wash. 1972) similarly recognized that the Act was merely designed to insure that environmental concerns were considered along with other policy concerns.

3. The special needs of New England

The Outer Continental Shelf holds for New England the promise, for the first time, of providing a nearby source of energy and thereby diminishing somewhat the gross disparity in energy costs between New England and the rest of the country.

The submissions on the Draft Environmental Impact Statement on Lease Sale 42 (Georges Bank) in Boston in December of 1976 reflect the urgency of OCS development. The submission of the Boston Chamber of Commerce detailed New England's heavy dependence upon oil as an energy source. While New England has only 6% of the United States' population it uses 20% of all United States' home heating oil and 25% of all United States residual oil. (Statement of Boston Chamber of Commerce, Binder Aff., ¶3). The typical unique difficulties faced by New England business were well set forth by the Wyman Gordon Company, a Massachusetts corporation engaged principally in engineering, production and marketing of technically advanced forgings. That company operates three plants in Massachusetts, employs 1500 people and has an annual payroll of approximately \$26 million (exclusive of fringe benefits). It is not engaged

in the petroleum business. The Wyman Gordon presentation illustrated the impact upon New England business of the absence of local production of energy.

According to Wyman Gordon the cost to it per thousand/
BTU's of gas is \$2.06, while the national average is \$1.39,
electricity^{5/} costs it 10.34; the national average is 7.77. Oil
cost is somewhat less than the national average. The company
stated that the slight advantage in oil is far outweighed by
the decided disadvantage in gas and electricity. In certain
instances, the disadvantage is even more pronounced in areas
where the company encounters major competition from other
forging companies. (Statement of Wyman Gordon, Binder Aff.
¶13.)

The Department of Interior recognized that the
Northeast pays the highest price for natural gas of any region
of the country and New England pays the highest price for
natural gas of any area in the Northeast. The Program Decision
Option Document ("PDOD") prepared by the Department of Interior
in conjunction with Lease Sale No. 40 states:

5/ In New England electricity is generated principally by oil.
In 1974 oil and gas accounted for 61.3%, nuclear energy accounted
for 24.4%, hydroelectric energy accounted for 6.9% and coal
accounted for 7.4% of New England electricity. (Federal Energy
Administration, 1976 National Energy Outlook at 241).

"One important way in which the Northeast region differs from the rest of the country is in the prices paid for natural gas. Both wholesale and retail prices in representative Northeast cities have been significantly higher than those paid in other parts of the country and have contributed to the area's heavy dependence on oil. Higher price levels reflect higher costs in both transmission and distribution." (PDOD at Appendix A, Ex. 7.)

According to figures contained in the PDOD, the price for natural gas in Boston is the highest in the country. The retail price for natural gas in Boston was \$2.17 per MCF in 1975 while the next highest price was the New York price of \$1.639 per MCF. (PDOD at App. A.)

One of the important points made by the Wyman Gordon representative was that over the short run petroleum and gas would have to provide energy needs so as to permit the necessary time to develop alternative sources of energy. The leases were seen by the representative of this New England company as a means of (1) reducing dependence upon foreign sources of supply; (2) bringing New England's energy costs more in line with other parts of the country; (3) increasing assurances of supply; and (4) allowing time to develop alternative sources of energy to meet long range needs. (Statement of Wyman Gordon, Binder Aff. at ¶3).

New England has traditionally had very little of its energy needs met by gas. In the hearing on Lease Sale 42 the

New England Gas Association submission showed that natural gas accounts for 9% and oil 80% of the energy consumed in New England compared with 28% and 47% nationally. Synthetic natural gas costs approximately \$5.35 per MCF and imported liquid natural gas costs approximately \$3.50 and \$4.50 per MCF. If gas is discovered in the outer Continental Shelf it is anticipated, according to the submission, that the cost will be significantly lower. The impact of such relatively low cost energy on New England is apparent. (Statement of New England Gas Association, Binder Aff. ¶3).

4. The overriding issue of economic health.

Concerned About Trident v. Schlesinger, 400 F.Supp. 454 (D.D.C. 1975), rev'd in part on other grounds, sub nom. Concerned About Trident v. Rumsfeld, 9 E.R.C. 1371 (D.C. Cir. 1976) articulates principles that should be considered in connection with the instant case. A domestic source of oil has such significance to the economy that it may become necessary to national survival. Without domestic oil, produced quickly, the American economy may falter. The United States is treading upon a precarious course in relying upon uncertain foreign sources for a substance so vital to the national health.

In the Trident case the court said:

"... the Court's inquiry is a narrow one and courts are not empowered to substitute

their judgment for that of the agency."
(Id. at 483).

The Court went on to say:

"While they must not ignore the environment in so doing, neither may they abdicate their primary responsibilities. NEPA, of course, does not require such abdication; it only demands that environmental factors be accorded consideration in substantive agency decisions." (Id. at 485.)

* * * *

The Court further stated:

"Environmental goals often conflict with economic and technical factors, and the consideration of these factors together demands, of course, a balancing process." (Id. at 486.)

* * * *

". . . that any adverse effects which cannot be avoided are justified by some other stated consideration of national policy, . . . "
(Id.)

* * * *

As to the test to be applied by a Court in reviewing the adequacy of an Environmental Impact Statement the Court said:

"The test of compliance with Section 102 is one of good faith objectivity rather than subjective impartiality." (Id. at 487.)

* * * *

"' ... the procedural requirements are not intended to be a strait jacket or to demand what is, fairly speaking, not meaningfully possible.'" (Id.)

* * * * *

"In determining the sufficiency of the environmental impact statement, the rule of reason applied in Natural Resources Defense Council, Inc. v. Morton, 148 U.S. App. D.C. 5, 458 F.2d 827, 837 (1972), must prevail and NEPA must be construed in its light." (Id. at 488).

* * * * *

"Essentially, this requires agencies to give environmental issues a 'hard look' before making decisions." (Id. at 489).

* * * * *

"'So long as the officials and agencies have taken the 'hard look' at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" (Id.)

The Environmental Impact Statement in issue here more than meets this standard.

The Court, in Concerned About Trident, went on to say that in the balancing process certain environmental concerns may be outweighed by the dictates of survival. The Court said:

"It is important to recognize that, from a substantive NEPA review aspect, agency

decisions dealing with the national defense and survival will, of necessity, be made with a different view toward environmental considerations and, indeed, most other considerations, than will non-defense related agency decisions." (Id. at 484.) (emphasis supplied)

* * * * *

"It is also a realization that some changes even major changes, in the environment may be required for the survival of the Republic." (Id.) (Emphasis supplied.)

* * * * *

"Survival" may well turn on the availability of a domestic source of energy.

In Brooks v. Volpe, 350 F.Supp. 269, 276-77 (D.Wash. 1972), it was recognized that NEPA could be abused by plaintiffs to delay projects indefinitely and that it was the obligation of the court to temper environmentalism with other matters of national policy.

"On the other hand, if the court were to rule that defendants must perform all possible research on the environmental effects of the highway, the project could be postponed indefinitely, perhaps forever. Emotional environmentalism must be tempered with rational realism. Litigants must not be allowed to use NEPA as a tool to destroy federal programs under the guise of interest in the environment. While Congress has increasingly expressed concern for protection of the natural environment, it has also articulated a strong national policy to complete construction of interstate highways as soon as possible."

In Natural Resources Defense Council v. Morton, 458 F.2d

827, 837 (D.C. Cir. 1972), the court said:

"The statute [NEPA] must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research -- and time -- available to meet the Nation's needs are not infinite."

In a situation in which the pressing need for development of a domestic source of oil and gas on the Outer Continental Shelf is so amply demonstrated by the many facts in the record and is so consistent with common sense, the far-fetched and conjectural type of inquiry which the lower court requires in connection with the Environmental Impact Statement cannot be tolerated. No purpose would be served by engaging in the speculation seemingly required under the lower court's order. Indeed there is nothing that the lower court would require that would contribute to the protection of the environment in its natural state; ample protection is provided in the various economic incentives applicable to the developers of the oil leases, and the statutes and regulations controlling the development and related activities in connection with the exploration, production and transportation of the energy sources involved. 6/

6/ See for example Gulf Oil Corp. v. Morton, 493 F.2d 141, 144 (9th Cir. 1973), in which the Court held that the Secretary of the Interior had the authority to suspend operations under existing leases upon a determination that the risk to the marine environment outweighs the immediate national interest in exploring and drilling for oil and gas.

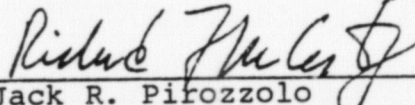
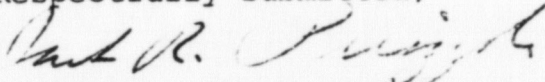
5. Conclusion

The New England Council urges the Court to consider the economic well-being of the country as an important part of its national interest. The record demonstrates that oil and gas exploration is an important facet in this country's economic well-being, and, most important, in the avoidance of dangerous dependence upon foreign governments. Without continued economic well-being the many other goals of the country, including matters concerning the environment, would suffer. In addition, the dire consequences of serious economic strangulation, of which this country had a sample during the Arab oil embargo, should not be forgotten in dealing with issues involving the balancing of the competing concerns involved in the instant case. The absence of this domestic source of energy would have a direct adverse effect upon New England.

The New England Council is in favor of reasonable measures to protect the environment and it believes that the Department of the Interior in the instant case has taken such reasonable measures. The program should proceed without

further impediment. The order of the lower court, under the circumstances in which the country finds itself at the present time, is not reasonable. It should be overruled.

Respectfully submitted,



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I, Jack R. Pirozzolo, attorney for The New England Council, hereby certify that I have this date served a copy of the foregoing on the parties in this action by causing a copy thereof to be mailed, postage prepaid, to the following:

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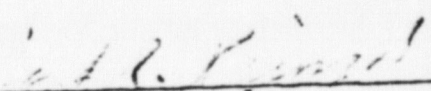
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Signed under the pains and penalties of perjury.



Jack R. Pirozzolo

March 25, 1977